

**United States Bankruptcy Court**

In Re:

**CHAPTER 7**

**Richard C. Mitchell**

**Case No. 10-20059**

Debtor

**MOTION BY DEBTOR TO AVOID JUDICIAL LIEN OF  
NEW ENGLAND PHEONIX COMPANY, INC.**

Richard C. Mitchell, the above-captioned Debtor, hereby moves this Court to enter an Order, pursuant to Section 522(1)(1) of the Bankruptcy Code, avoiding the judicial lien of New England Pheonix Company, Inc. ("NE PHEONIX"), as said lien impairs the exemption to which the Debtor is entitled with respect to this residential real estate.

In support of this Motion, the Debtor states as follows:

1. On September 15, 2010, the Debtor filed a petition for relief under Chapter 7 of Bankruptcy Code.
2. The Debtor's ex-wife has listed as her residence a one family home located at 127 Prospect St., Sherborn, MA (the "Property"). The Debtor has scheduled the property as an asset on his Schedule A-Real Property and claimed it as exempt on Schedule C-Property Claimed as Exempt, filed with this Court. The Property has a current market value of \$555,000 (Exhibit A).
3. The Debtor bases his opinion of value upon inspection of the Property of real estate values in the vicinity of the Property by Cynthia M. Allen, VP Century 21 Commonwealth (Exhibit A).
4. The Property has a Declaration of Homestead by the resident co-owner, Noreen M. Mitchell, filed in the Middlesex South Registry of Deeds (Exhibit B).
5. The Property is subject to a first mortgage in favor of U.S. Bank Home Mortgage with an outstanding principal balance of approximately \$143,048.00 and a second Mortgage in favor of Bank of America with an outstanding principal balance of

approximately \$107,112.67. NE PHEONIX, asserts a judicial lien against the Property in the amount of approximately \$210,871.27 based upon a judgment against the Debtor entered on 6/8/2010 in the Norfolk Superior Court Docket # 9-2195. A true copy of the writ of execution with respect to said judgment is annexed hereto as Exhibit "C". The judgment arises out of a business debt obligation of the Debtor.

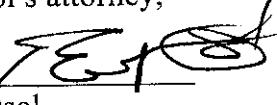
6. The exemption that is impaired is the homestead exemption of \$500,000.00 claimed under Massachusetts General Laws, c. 188, § 1.
5. Pursuant to Section 522(f)(2)(A) of the Bankruptcy Code, the judicial lien of NE PHEONIX is avoidable, for the reason that the sum of all of the liens on the Property plus the Debtor's exemption exceeds the value of the Debtor's interest in the Property in the absence of any judicial liens as described below:

U.S. Bank Home Mortgage (Mortgage)	\$143,048.00
Bank of America (Mortgage)	+ \$107,112.67
	\$250,160.67
NE PHOENIX (judicial lien)	+ \$210,871.27
<u>Debtor's Exemption (M.G.L. c. 188 § 1)</u>	+ \$500,000.00
	\$961,031.94
OPINION OF VALUE	- \$555,000.00
	\$406,031.94

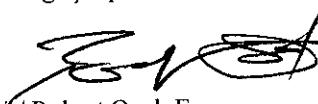
6. The \$210,871.27 judicial lien of NE PHEONIX exceeds the value of the Debtor's interest and applicable exemptions in the Property. As a result, the lien is avoidable under 11 U.S.C. § 522(f)(2)(A).

WHEREFORE, the Debtor respectfully requests that this Court enter an order avoiding the judicial lien of NE PHEONIX with respect to the Property and directing NE PHOENIX to discharge and release said judicial lien as soon as practicable following allowance of this Motion and discharge of this bankruptcy.

Respectfully Submitted,  
By Debtor's attorney,

  
Robert Osol  
MELIA & OSOL  
16 Harvard St.  
Worcester, MA 01609  
September 10, 2010  
508-753-5552  
BBO#380625

I, Robert Osol, Esq., certify that I served a copy of the MOTION TO REMOVE JUDICIAL LIEN on the parties named in the attached service list by first class mail, postage prepaid this 5<sup>th</sup> day of October 2010.

  
/s/ Robert Osol, Esq.  
Melia & Osol  
16 Harvard Street  
Worcester, MA 01609  
(508) 753-5552  
BBO#380625

#### CERTIFICATE OF SERVICE

**New England Pheonix Company**  
John M. Keough, Esq.  
337 Freeport St.  
Boston, MA 02122

**Noreen M. Mitchell**  
127 Prospect St.  
Sherborn, MA 01770

**U.S. Bank Home Mortgage**  
Bankruptcy Department  
4590 E. Broad St.  
Columbus, OH 43213

#### VIA ECF/PACER

**Mark G. DeGiacomo, Chapter 7 Trustee**  
**John Fitzgerald, Office of the U.S. Trustee**

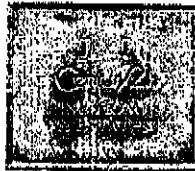
**Bank of America**  
Bankruptcy Department  
P.O. Box 22002  
Greenboro, NC 27420

**Town of Sherborn**  
**Tax Collector**  
19 Washington St.  
Sherborn, MA 01770

**Richard C. Mitchell**  
204 E. Central St.  
P.O. Box 206  
Natick, MA 01760

EXHIBIT

A



**Opinion of Market Value  
127 Prospect St.  
Sherborn, MA 01770**

Inspection 10 September 2010 revealed an Old Style home, farmhouse in nature and in an area of similar homes. The home has nine rooms, five bedrooms and one and one half baths. The living area is listed by the town of Sherborn as 2873 square feet. There is no garage.

There are three levels of living space. The first floor is comprised of a fire-placed living room, dining room, kitchen and half bath. There is also a lovely, but unheated porch.

The second floor has three/four bedrooms and one full bath. The fourth bedroom is quite small to be actual sleeping quarters but does qualify as such as there is a closet. There is also an unheated sleeping porch. The third floor has two unheated bedrooms.

The home appears to be in average condition with some notable exceptions that would adversely affect marketability. Clearly there has been water in the lower level and there is a slight odor of moisture. There are some electrical and plumbing issues that would also need to be resolved.

The house is sited on 10.02 acres. Usually land is a driving consideration in pricing, however, there is a 250 foot wide Boston Edison easement and high tension towers on the property that will dramatically impact marketability in a negative way. There is no value as buildable lots.

**CENTURY 21 Commonwealth**

The roof is asphalt shingle and rubber. There is evidence that perhaps the roof needs professional attention. The exterior of the house is wood shingles and will need painting in the near future. The overall landscape is wooded with a country feel.

The audience for a house of this vintage is small and, like most other towns in the Commonwealth, Sherborn's property values have declined of late.

Based on this inspection and the inspection of other comparable properties within the town of Sherborn, fair market value of this property is approximately \$555,000. Fair market value being what a ready, willing and able buyer would pay.

Respectively submitted,

*Cynthia M. Allen*

Cynthia M. Allen  
Vice President  
CENTURY 21 Commonwealth  
617.943.5543

EXHIBIT B

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## DECLARATION OF HOMESTEAD

I, Noreen M. Mitchell, of 127 Prospect Street, Sherborn, Middlesex County, Massachusetts, owning and occupying as my principal residence the real estate at 127 Prospect Street in Sherborn, Massachusetts acquired by me by deed from Richard C. Mitchell and Noreen M. Mitchell, Trustees of the Prospect Street Realty Trust under Declaration of Trust dated January 2, 1998 and recorded in the Middlesex South District Registry of Deeds at Book 29620, Page 591, which deed is dated March 13, 2002 and recorded herewith at the Middlesex South District Registry of Deeds, hereby declare a homestead in said premises under the provisions of Chapter 188, Section 1, of the General Laws of Massachusetts.

I expressly reserve the right to myself and my spouse and to the survivor of us, and to the Executor or Administrator of the survivor of us, to revoke and rescind this Homestead as to ourselves and our minor, unmarried children.

Executed as a sealed instrument this 12 day of March, 2002.

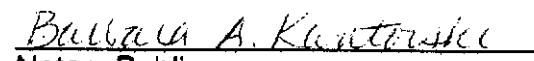
  
Noreen M. Mitchell

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

March 12, 2002

Then personally appeared the above-named Noreen M. Mitchell a/k/a Noreen M. Payne known to me to be the person described in and who executed the foregoing instrument and acknowledged the same to be her free act and deed, before me,

  
Barbara A. Kauterwicz  
Notary Public  
My commission expires: June 30, 2006

MSD 03/13/02 02:02:06  
1107  
10.75

EXHIBIT C

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss  
9-2195



To the Sheriffs of our several Counties, or their Deputies  
WHEREAS NEW ENGLAND PHOENIX CO INC

by the consideration of our JUSTICES OF OUR SUPERIOR COURT holden at Dedham within  
and for the County of Norfolk, aforesaid, on the 8<sup>th</sup> day of June, 2010 recovered judgment  
against RICHARD C. MITCHELL

✓  
damages: 208,091.73

cost 281.25

Int 2,498.29

210,871.27

In an action of Contract

for the sum of two hundred eight thousand ninety one dollars and seventy three cents  
damages, costs in the sum of two hundred eighty one dollars and twenty five cents, with  
interest to date of this execution in the sum of two thousand four hundred ninety eight dollars  
and twenty nine cents, whereof execution remains to be done: WE COMMAND you therefore  
that of the goods, chattels or lands of the said Judgment Debtor within your precinct, you  
cause to be paid and satisfied unto the said Judgment creditor at the value thereof of money,  
the aforesaid sums being, two hundred ten thousand eight hundred seventy one dollars and  
twenty seven cents with interest thereon from the date of this execution, and thereof also to  
satisfy yourself for your own fees aforesaid the full sum above mentioned, with your fees, or  
be discharged by said Judgment creditor, or otherwise by order of law.

Hereof fail not, and make return of this writ with your doings thereon into the Clerk's office  
of our said Court, at Dedham within our County of Norfolk, within twenty years after the  
date of said judgment.

Witness, Barbara J. Rouse, Esquire at Dedham, the 9<sup>th</sup> day in July, in the year of our Lord  
two thousand and ten.

John M. Keough, Esq.,  
New England Phoenix Company Inc  
337 Freeport Street  
Boston, MA 02122

*Susanna Foster*  
Assistant Clerk

A TRUE COPY ATTEST  
*Barbara Moloney*  
DEPUTY SHERIFF

Middlesex, ss.

July 16, 2010

By virtue of this execution which has been placed in my hands for the purpose of taking the land of the within-named judgment debtor Richard C. Mitchell of 204 East Central Street, Natick, County of Middlesex, I have this day seized and taken all the right, title and interest which said judgment debtor had, (not exempt by law from levy on execution or from attachment) on the Twenty-Eighth day of December, 2009, at 9:00 o'clock a.m., being the time when same was attached on mesne process in and to the following described real estate, to wit: *127 Prospect Street, Sherborn*

PROPERTY ADDRESS: 127 Prospect Street, Sherborn, Massachusetts

the land in Sherborn, Middlesex County, Massachusetts, with the buildings thereon, being shown as Lot 5 on a Plan entitled "Plan of Land in Sherborn, Mass. Date: November 11, 1987, Property of Helena B. Geoghegan Engineers and Surveyors: Connorstone Inc." to be recorded herewith and being more particularly bounded and described as follows:

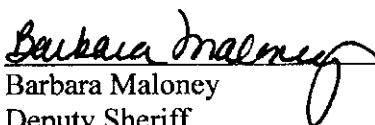
NORTHERLY	by Prospect Street 527.02 feet;
EASTERLY	by Lot 4 on said Plan by five lines, measuring respectively, 342.02 feet, 78.16 feet, 146.70 feet, 60.65 feet, and 160.00 feet;
SOUTHEASTERLY	by Lot 3 on said Plan, 108.15 feet;
SOUTHERLY	by Lot 3 on said Plan, by three lines, measuring respectively, 304.12 feet, 134.50 feet and 156.38 feet;
SOUTHEASTERLY	again by said Lot 3, 91.63 feet;
SOUTHWESTERLY	by Perry Street 178.05 feet;
NORTHWESTERLY	by land now or formerly of Stucchi by two lines, measuring respectively, 146.01 feet and 40.27 feet;
NORTHEASTERLY, NORTHWESTERLY and SOUTHWESTERLY	by said land now or formerly of Stucchi, 32.70 feet, 32.50 feet and 32.70 feet;
NORTHWESTERLY	by lands now or formerly of Stucchi and Webb on said Plan, 215 feet and 157.33 feet and
WESTERLY	by land now or formerly of Webb, 326.18 feet.

Containing, according to said Plan, 436,413 square feet or 10.02 Acres.

The premises are conveyed subject to 100' Wide Boston Edison Company Easement as shown on said Plan and a 250' Wide Boston Edison Company Easement as shown on said Plan.

Being the same premises conveyed to the Grantors by deed dated January 2, 1998 and recorded with the Middlesex South District Registry of Deeds in Book 29620, Page 600.

And I levied this execution thereupon.

  
Barbara Maloney  
Deputy Sheriff

RETURN TO:

John Keough  
New England Phoenix Co., Inc.  
337 Freeport Street  
Boston, MA 02122